COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2230

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

M-P ENTERPRISES, LTD.,

PLAINTIFF-APPELLANT,

V.

SOCIETY INSURANCE, A MUTUAL COMPANY,

DEFENDANT-RESPONDENT,

KENDALL LUDIN AND PATRICK AXON,
D/B/A L.A. ROOFING,

DEFENDANTS.

APPEAL from an amended order of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. M-P Enterprises, Ltd., has appealed from an amended order granting summary judgment and dismissing its action against

Society Insurance on the grounds that the insurance policy issued by Society to Kendall Ludin and Patrick Axon, d/b/a L.A. Roofing, provided no coverage for damages to M-P's property arising from an allegedly faulty roofing job performed by L.A. Roofing. We affirm the amended order.

Our review of the trial court's grant of summary judgment is de novo. *See* ***Millen v. Thomas,*** 201 Wis.2d 675, 682, 550 N.W.2d 134, 137 (Ct. App. 1996). Summary judgment is warranted when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See* ***id.*** Furthermore, the interpretation of an insurance policy presents a question of law which we review independently of the trial court. *See* ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis.2d 808, 810, 456 N.W.2d 597, 598 (1990).

The material facts underlying Society's motion for summary judgment were undisputed. M-P operates an auto body repair shop and contracted with L.A. Roofing for repair of a leaking roof. According to M-P's complaint and affidavits, the roof continued to leak after the repairs were performed, causing significant damage to other areas of M-P's building and interrupting M-P's business. In its complaint, M-P sought damages for the cost of repairs to the interior of the building necessitated by the leaking, damages arising from the interruption of its business and cleanup time, and the cost of repairing damaged areas of the neighboring roof structure, allegedly caused by the inadequate repair of the portion of the roof worked on by L.A. Roofing.

On appeal, M-P acknowledges that the insurance policy issued by Society to L.A. Roofing did not provide coverage for the cost of redoing the repair work performed by L.A. Roofing. However, it contends that coverage is provided for damage to areas which are physically separate and distinct from the areas

worked on by L.A. Roofing, and for the business interruption caused by the damage to those areas. We disagree.

The policy issued by Society to L.A. Roofing was a Commercial General Liability (CGL) policy. The CGL policy covers property damage caused by an occurrence which takes place in the coverage territory. "Property damage" is defined in Section V, 12.a. of the policy as "[p]hysical injury to tangible property, including all resulting loss of use of that property" or "[l]oss of use of tangible property that is not physically injured." There is no question that M-P seeks to recover damages for physical injuries to parts of its property and damages arising from its loss of use of that property. Accordingly, we presume the complaint states a claim for property damage caused by an occurrence as defined by the policy.

The question then is whether coverage is excluded under the terms of the policy. Section I, Coverage A, 2. provides that the policy does not apply to:

> m. "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency, inadequacy or dangerous condition in … "your work;" or
>
> (2) A … failure by you … to perform a contract or agreement in accordance with its terms.
>
> n. Damages claimed for any loss, cost, or expense incurred by … others for the loss of use, … repair, replacement, adjustment, removal or disposal of:
>
> (2) "Your work;" or
>
> (3) "Impaired property."
>
> if such … work or property is withdrawn …from use … because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

"Impaired property" is defined in Section V, 5. of the policy as:

> [T]angible property, other than "your product" or "your work," that cannot be used or is less useful because:
>
> a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
>
> b. You have failed to fulfill the terms of a contract or agreement;
>
> if such property can be restored to use by:
>
> a. The repair, replacement, adjustment or removal of "your product" or "your work;" or
>
> b. Your fulfilling the terms of the contract or agreement.

These provisions are a form of business risk exclusion. In Wisconsin, the "business risk" of faulty workmanship does not give rise to coverage under CGL policies. *See* ***St. John's Home v. Continental Cas. Co.***, 147 Wis.2d 764, 788-89, 434 N.W.2d 112, 122 (Ct. App. 1988).[1]

Business risk refers to the expenses of repair or replacement incurred by a contractor in the event his or her work does not live up to its warranties. *See* ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis.2d 259, 261-62, 371 N.W.2d 392, 393 (Ct. App. 1985). Although an insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or unsuitable and may be required to completely redo or replace the deficient work, this liability is not what CGL policies were designed to cover. *See* ***id.*** at 265, 371 N.W.2d at 394. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss

[1] M-P argues that this court should not address the issue of whether coverage was precluded as a business risk because this was not the basis for the trial court's decision. In support of this argument, it cites the rule that an appellate court will not review issues which are raised for the first time on appeal. S*ee* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992). Its reliance on this rule is misplaced because the business risk issue was raised by Society in the trial court. In any event, an appellate court may uphold a trial court's ruling on a theory or reasoning not presented in the trial court. S*ee* ***State v. Holt,*** 128 Wis.2d 110, 125, 382 N.W.2d 679, 687 (Ct. App. 1985).

because the completed work is not that for which the damaged person bargained. *See* ***id.***

Like the insured in ***Bulen***, L.A. Roofing contracted for insurance protection against tort liability, not for contractual liability. *See* ***id.*** at 265, 371 N.W.2d at 394-95. The exclusions set forth in Society's policy must be examined in light of these principles.[2]

The policy issued by Society excluded from coverage not only damages incurred in repairing or replacing the portion of the roof which was inadequately repaired by L.A. Roofing, but also damages to property impaired as a result of that faulty workmanship and the economic loss resulting from the loss of use of that property. The damages to other parts of M-P's building which arose when water continued to leak after L.A. Roofing completed its work fell within Society's impaired property exclusions. The water-damaged portions of M-P's building could not be used or were less useful because L.A. Roofing failed to adequately repair the leaking roof. They could be restored to use only by the repair, replacement or adjustment of L.A. Roofing's defective work or by L.A.

[2] We recognize that ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis.2d 259, 371 N.W.2d 392 (Ct. App. 1985), resolved only whether coverage was provided under a CGL policy for faulty workmanship and not the situation presented here where the insured's faulty workmanship caused property damage in areas which were not worked on by the insured. Nevertheless, ***Bulen*** guides us here by pointing out that breach of contract situations are encompassed within business risk exclusions. This is not a case where a noncontracting party has been injured as a result of L.A. Roofing's faulty workmanship. Instead, this case involves a contractor deficiently performing its work to the damage of the party with whom it contracted. It follows from ***Bulen*** that this is the type of situation that is targeted by business risk exclusions.

Roofing fulfilling the terms of its contract and adequately repairing the roof.[3] Pursuant to its policy, Society was liable for neither the cost of repairing the impaired property or the loss of use of that property. The trial court therefore properly granted summary judgment dismissing M-P's complaint against Society.

By the Court.—Amended order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[3] M-P contends that the portions of the building which were not worked on directly by L.A. Roofing were not "impaired property" because they will not be fixed by the repair of L.A. Roofing's poor work. However, it is obvious that the repair or replacement of L.A. Roofing's work is necessary to restore the other parts of M-P's building to use, since absent such repairs the roof will continue to leak and damage them. We therefore conclude that the portions of the building for which M-P seeks damages constitute impaired property.